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No. 88-589

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MICHAEL SULLIVAN,

Petitioner,

v.

HARTFORD ACCIDENT & INDEMNITY COMPANY,

Respondent,

and

FORD CITY BANK,

Respondent.

BRIEF OF RESPONDENT FORD CITY BANK IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the Seventh Circuit correctly held that the District Court did not have subject matter jurisdiction over a state law claim asserted by a defendant (Petitioner) against a newly impleaded non-diverse party (Respondent-Bank) where:

1. Subject matter jurisdiction over the plaintiff's claim against defendant-Petitioner was based upon diversity of citizenship;

2. Petitioner's claim admittedly was not a third-party claim under F.R.Civ.P. 14(a) and did not seek to hold the Bank liable for "all or part of" plaintiff's claims against defendant-Petitioner; and

3. Petitioner's claim arose "at different times and from different events" than did the underlying federal claim, and the two claims were "not . . . logically entwined in the sense that the decision in one suit would necessarily decide the other by operation of collateral estoppel or otherwise."

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Respondent Ford City Bank[1] ("Respondent-Bank") prays that the Petition for Writ of Certiorari be denied with respect to Question 1 stated on page i of the Petition.[2]

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[1] Respondent Ford City Bank is now a wholly-owned subsidiary of Cole Taylor Financial Group, Inc. and is presently named Cole Taylor Bank - Ford City.

[2] The Opinion of the Court of Appeals for the Seventh Circuit which is the subject of the Petition comprehends two consolidated appeals, Nos. 87-1784 and 87-1843. Respondent-Bank was a party only to appeal No. 87-1784, and Question 1 pertains to that appeal. Respondent-Bank takes no position with respect to Question 2 which pertains only to Appeal No. 87-1843 and has no bearing on Question 1.

STATEMENT OF THE CASE

Petitioner's statement of the case is inaccurate insofar as it pertains to the jurisdictional issue. Respondent-Bank offers the following statement.

The Pertinent Substantive Facts

Richard Orlak and two officers of Respondent-Bank conspired to defraud it into making real estate loans to Orlak between 1972 and early 1974. (A-1 - 3). Petitioner, Orlak's attorney and co-venturer, was a beneficiary of one of the fraudulent loans, in connection with which he assigned to Respondent-Bank his 50% beneficial interest in an Illinois land trust as collateral security for all past and future indebtedness of Orlak. (A-2 - 3 and A-30).

Orlak filed for bankruptcy in early 1974, owing Respondent-Bank several million dollars. (A-3 and A-41). In September 1974, as part of an effort to foreclose on its security for Orlak's indebtedness, Respondent-Bank demanded that Petitioner unconditionally assign it his previously pledged collateral. (A-41 - 42). Petitioner did so. After liquidating all of its collateral, Respondent-Bank still incurred a loss of over $1.5 million on its loans to Orlak. (A-3).

In 1976, Respondent-Bank made a claim against Respondent Hartford Accident & Indemnity Company ("Hartford") on a fidelity bond covering the Bank officers (Beede and Quinn) who had conspired with Orlak to defraud it, settled that claim, and assigned to Hartford all of its rights against Orlak, Beede, Quinn and Petitioner. (A-3 - 4).

The District Court Proceedings

Hartford sued Petitioner on two assigned claims which arose out of transactions occurring between 1972 and early 1974.

Petitioner impleaded the Bank pursuant to a pleading entitled "Counterclaim and Third Party Complaint" which asserted that the Bank's September 1974 demand upon Petitioner breached a fiduciary duty imposed on the Bank because it was Petitioner's land trustee.

The District Court entered judgment, *inter alia*, against Hartford and for Petitioner on the Complaint, and entered judgment for Petitioner and against the Bank on the "Counterclaim and Third Party Complaint."

Proceedings In The Court Of Appeals

Respondent-Bank argued that the District Court erred, under the applicable Illinois statute, in holding that it owed Petitioner any fiduciary duty in September 1974, and that it erred in assuming subject matter jurisdiction over Petitioner's claim because it did not satify the tests for ancillary jurisdiction over third-party claims set forth in *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 305 (1978).

Petitioner argued that his claim was not a third-party claim and that *Owen* did not apply even if it was, but took the position that it was within the District Court's "ancillary" jurisdiction because it was a "compulsory counterclaim" which arose out of the "same transaction or occurrence" as plaintiff's claims.

The Seventh Circuit analyzed all of the claims and the context in which they were asserted and rejected the factual premise for Petitioner's argument, holding (A-9) that:

> The proper analogy to Sullivan's claim against Ford City Bank is permissive, not compulsory, counterclaim. Hartford's claim against Sullivan arises out of the fraudulent scheme by Orlak and others to defraud the Bank, while Sullivan's claim against the Bank arises out of the Bank's efforts to cut its losses by foreclosing the Neuport Estates loan *after* the frauds were discovered. The claims involved considerable factual overlap, of course, but they arise at *different times* from *different events* and thus flunk the test of same transaction or occurrence. (Emphasis added).

The Seventh Circuit further applied the "logical dependency" rationale of *Owen* and held that, while Hartford's claims and Petitioner's claims were "related, . . . they are not . . . logically entwined in the sense that the decision in one suit would necessarily decide the other. . . ." (A-5).

SUMMARY OF ARGUMENT

The Seventh Circuit's decision was correct and is consistent with the decisions of other Circuit Courts of Appeal and with this Court's decision in *Owen*. Petitioner has cited no case which holds or suggests that "ancillary" jurisdiction properly extends to a claim against a newly impleaded non-diverse party where the claim does not arise out of the "same transaction or occurrence" as the plaintiff's claim against the defendant within the meaning of F.R.Civ.P. 13(a) and where that claim does not seek to hold the impleaded party liable "for all or a part of" the plaintiff's claim against the defendant within the meaning of F.R.Civ.P. 14(a).

ARGUMENT

THE SEVENTH CIRCUIT'S DETERMINATION THAT THE DISTRICT COURT LACKED JURISDICTION OVER PETITIONER'S CLAIM AGAINST THE RESPONDENT-BANK IS CONSISTENT WITH SETTLED LAW, CREATES NO CONFLICT AMONG THE CIRCUITS, AND WILL NOT IMPROPERLY CONSTRICT THE JURISDICTION OF THE FEDERAL COURTS.

(1) Petitioner first argues that the decision is in conflict with the decisions of the Fifth and Third Circuits in *Rogers v. Aetna Casualty and Surety Co.*, 601 F.2d 840, 843 and n.4 (5th Cir. 1979); *H.L. Peterson Company v. Applewhite*, 383 F.2d 430, 433 (5th Cir. 1967); *Saalfrank v. O'Daniel*, 533 F.2d 325, 329 (3d Cir.), *cert. denied*, 429 U.S. 922 (1976); and *Field v. Volkswagenwerk AG*, 626 F.2d 293, 298-99 (3d Cir. 1980). It is not.

Petitioner claims that these decisions stand for the general proposition that *any* claim against a newly impleaded party is the proper subject of ancillary jurisdiction so long as it is denominated a "third-party" claim and is somehow "related" to the underlying federal claim. (Pet. p. 10).

This is patently not what these cases hold. Rather, they simply hold that ancillary jurisdiction may be invoked over true third-party claims for indemnity, contribution, or other forms of derivative liability by which a defendant seeks to hold an impleaded party liable under Rule 14(a) "for all or part" of the plaintiff's claim against him. All of the cases relied upon by Petitioner involve Rule 14(a) claims for contribution or indemnity. *Rogers*, 601 F.2d at

843; *Peterson*, 383 F.2d at 432; *Saalfrank*, 533 F.2d at 327; and *Field*, 626 F.2d at 299.[3]

Petitioner's claim against Respondent-Bank, however, did *not* seek contribution or indemnity for his liability to Hartford, nor did it even purport to be a third-party claim under Rule 14(a). These admissions were expressly made by Petitioner in his Brief to the Seventh Circuit (Sullivan Brief at 14):

> Ford City Bank misconstrues Sullivan's joinder of it as an impleader of a third-party defendant under Federal Rule of Civil Procedure 14(a).
>
> * * * *
>
> But Sullivan did not invoke the standard of Rule 14(a) that if he is liable to the Hartford, then the Ford City Bank is liable to him, and the pleadings do not even remotely suggest such a claim.

The cases cited by Petitioner are therefore inapposite to the admitted jurisdictional facts of this case. They all involve ancillary jurisdiction over Rule 14(a) third-party indemnity and contribution claims. This case admittedly does not involve such facts, nor did the Seventh Circuit hold or suggest that ancillary jurisdiction is not appropriate in such circumstances. There is no conflict.

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[3] Moreover, to the extent any of these cases arguably could be read to stand for a broader rule, they do not reflect the present state of the law in either the Fifth or Third Circuits, both of which now recognize that state law claims against newly impleaded non-diverse parties are not the proper subject of ancillary jurisdiction unless they both: (1) arise out of the same nucleus of operative facts as the underlying claim; and (2) are "logically dependent" upon the underlying claim. *See Birmingham Fire Ins. v. Winegardner and Hammons, Inc.*, 714 F.2d 548 (5th Cir. 1983); *Travelers Ins. Co. v. First Nat'l Bank*, 675 F.2d 633 (5th Cir. 1982); and *Finkle v. Gulf & Western Mfg. Co.*, 744 F.2d 1015 (3d Cir. 1984).

(2) Petitioner next argues that the decision is contrary to this Court's decision in *Owen* because the facts of this case satisfy the "logical dependence" test set forth therein. This argument is: directly contrary to the position taken by Petitioner in the Seventh Circuit; directly contrary to the Seventh Circuit's finding; and is ultimately unavailing because Petitioner does not even argue that he fulfilled all of the *other* separate and independent requirements for ancillary jurisdiction mandated by *Owen*.

Petitioner's reliance upon *Owen* is directly contrary to the position he took in the Seventh Circuit (Sullivan Brief at 14-15) where he argued both that his claim was not a third-party claim, and that, even if it was so construed, the "logical dependency" test set forth in *Owen* still did *not* apply to it:

> If this Court construes the addition of Ford City Bank as an impleaded third-party defendant . . . , Sullivan argues . . . that *Owen* does not require a logical dependency test to be applied to third party complaints.

Moreover, even if Petitioner were permitted to avoid his prior contrary position, his factual argument is without merit because, as the Seventh Circuit correctly found, his claim flunked the "logical dependency" test.

Owen involved a state law claim brought under Rule 14(a) by a plaintiff against a non-diverse party who had previously been impleaded by defendant.

In holding that ancillary jurisdiction did *not* properly extend to that claim, this Court reiterated two separate tests for "ancillary" jurisdiction—the "common nucleus" test deriving from *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966), and the "statutory" test deriving from *Aldinger v. Howard*, 427 U.S. 1, 14-15 (1976). It also

added a third test—that the claim must be "logically dependent" upon the outcome of the federal claim. *Owen*, 437 U.S. at 376. A true third-party claim which comports with Rule 14(a) by seeking recovery "for all or a part of" the liability sought to be imposed upon on the claimant is the paradigm of "logical dependency" because such a claim "depends at least in part upon the resolution of the primary lawsuit." *Id.*

Petitioner's claim itself did not allege that it depended upon the resolution of plaintiff's claims against him. Petitioner further conceded that it was *not* a third-party claim conforming to Rule 14(a). Moreover, the Seventh Circuit applied the rationale of *Owen* and held (A-5) that there was *in fact* no relationship of "logical dependence" between the two claims:

> The issues in the two suits are closely related, but they are not identical, nor logically entwined in the sense that the decision in one suit would necessarily decide the other by operation of collateral estoppel or otherwise. None of the parties argues that if Hartford wins, Ford City must win, or that if Hartford loses, Ford City must lose.

This conclusion was patently correct. Hartford won but the Bank lost. The Bank's alleged liability to Petitioner therefore obviously did *not depend* at all upon whether or not Petitioner was liable to Hartford; nor was Respondent-Bank's non-liability to Petitioner established by Petitioner's non-liability to Hartford. Had there been any relationship of "logical dependence," Petitioner's claim would have had to have been dismissed (or at least diminished) upon his successful defense of Hartford's claims. It was not.

Finally, the "logical dependence" issue need not even be reached by this Court in denying the Petition. Ancillary jurisdiction may *never* be invoked, as a Constitutional matter, unless the claim arises out of "the same common nucleus of operative facts" as the federal claim. *Owen*, 437 U.S. at 391. The Seventh Circuit correctly found that the "common nucleus" standard was not satisfied here because the two claims arose "at different times from different events." (A-9). Petitioner has not sought review of that finding. Accordingly, even if the "logical dependence" test had been fulfilled, the decision is still correct and would have to be affirmed on a dispositive ground as to which Petitioner has not even sought review by this Court.

(3) Petitioner's final argument (Pet. 13-14) is that this decision ignores public policy and will mandate "waste" in the administration of justice in the Seventh Circuit. This argument is without merit.

The Seventh Circuit's careful analysis was very fact specific, did not enunciate any general rule applicable beyond the peculiar facts of this case, and gave appropriate recognition to the policy considerations inherent in the judge-made doctrine of ancillary jurisdiction. (A-4 - 10). This decision, therefore, does not purport to and cannot have any impact upon the generally recognized application of that doctrine to Rule 14(a) claims against new parties who may be liable to a defendant "for all or a part of" the liability sought to be imposed upon him (and which otherwise satisfy the requirements of *Owen*), or to Rule 13(a) "compulsory" counterclaims.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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